Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1998

BAILEY A. JONES,
Petitioner,

v.

CITY OF BERKELEY RENT STABILIZATION BOARD,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal for the First Appellate District

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTION PRESENTED

Did the California Court of Appeal err in holding that, contrary to decisions of this Court, the Ninth Circuit Court of Appeals, and the state courts of New York, a property owner cannot state a claim for a regulatory taking based solely on the failure of land use regulations to substantially advance legitimate state interests as applied to his particular property?

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Petitioner Bailey A. Jones respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District, entered in the above-entitled proceeding on August 13, 1997.

OPINIONS BELOW

The decision of the California Court Appeal is unreported and is reproduced as Appendix (App.) A to this petition. The Order Granting Defendant's Motion for Judgment on the Pleadings entered by the Alameda County Superior Court is unreported and is reproduced as Appendix E.

JURISDICTION

The opinion of the California Court of Appeal that is the subject of this petition was filed and entered on August 13, 1997. App. A. The Court of Appeal considered and decided the question of whether allegations that Berkeley's rent control law failed to substantially advance legitimate state interests supported a claim for an uncompensated regulatory taking of Mr. Jones' property in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The California Supreme Court granted Mr. Jones' petition for review on November 25, 1997 (App. C), but dismissed its order granting review on March 9, 1999 (App. B). This petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "private property [shall not] be taken for public use, without just compensation."

City of Berkeley Municipal Code Chapter 13.76, Rent Stabilization and Eviction for Good Cause Program (the Rent Control Law), imposes rent control on privately owned

residential rental property in Berkeley and exacts annual fees from owners to finance the rent control program. Relevant portions of the Rent Control Law are reproduced at Appendix F.

STATEMENT OF THE CASE

Petitioner Bailey A. Jones challenges the constitutionality of the continued application by the City of Berkeley Rent Stabilization Board (Rent Board) of a rent control ordinance to his property. Facts alleged in Mr. Jones' complaint, presumed true for purposes of appeal, establish that the continued application of this law to his property bears no nexus to the mitigation of any social ills attributable to Mr. Jones' unregulated use of his property. The decision of the court below, affirming a grant of judgment on the pleadings to the Rent Board, conflicts with decisions of the United States Court of Appeals for the Ninth Circuit and of the state courts of New York. It also conflicts with the constitutional standards set forth by this Court for property regulations challenged under the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

A. Berkeley's Rent Control Law and Bailey Jones' Property

Bailey Jones provides affordable rental housing to the residents of Berkeley, California. Under the City's Rent Control Law,[1] as administered by the Rent Board, Mr. Jones may not offer his apartments for rent unless he complies with a number of conditions, including paying annual registration fees to finance the Rent Board's operations.

Under the Just Compensation Clause of the United States Constitution,[2] regulations that impose conditions on the use of

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[1] Berkeley Municipal Code Chapter 13.76.

[2] The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without

(continued...)

private property must substantially advance legitimate governmental interests. *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). The stated purposes of Berkeley's Rent Control Law are to "protect tenants from unwarranted rent increases" and to "advance the housing policies of the city with regard to low and fixed income persons, minorities, students, handicapped, and the aged." App. F-2-3.

Facts alleged in Mr. Jones' complaint establish that the application of the Rent Control Law does not advance these interests but, instead, has actually *diminished* the supply of affordable rental housing available to the law's supposed beneficiaries, effectively forcing these vulnerable population groups to flee Berkeley in search of affordable accommodations elsewhere. App. A-3-4. Moreover, the complaint alleges that the Rent Board's regulations are not protecting anyone residing in Mr. Jones' property from "unwarranted rent increases," because market rents for Mr. Jones' affordable housing are less than those authorized by the Rent Board. App. A-3.

B. The Trial Court Proceedings

Because the Rent Board's application of the Rent Control Law to Mr. Jones' property does not (and cannot) protect his tenants from "unwarranted rent increases," and because the law's devastating effect on Berkeley's housing market has been precisely the opposite of its stated purpose, Mr. Jones challenged the constitutionality of the continued application of the Rent Control Law to his property, and specifically the Rent Board's forced exaction of monetary fees from him to finance its

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[2](...continued)
payment of just compensation." U.S. Const. amend. V. The Fifth Amendment is made applicable to the states via the Fourteenth Amendment. *Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).

operations, as a violation of the Just Compensation Clause. App. A-4.

The trial court granted the Rent Board's motion for judgment on the pleadings on the clearly erroneous grounds that a regulatory taking claim supposedly requires allegations that the plaintiff has been deprived of all economically viable use of his property. App. E-2. The court found that "[t]he allegation the Rent Ordinance does not substantially advance its purpose is inadequate on its own to state a cause of action for a taking." *Id.*

C. The Court of Appeal's Decision

Mr. Jones filed a timely appeal to the California Court of Appeal, First Appellate District. In his opening brief to the appellate court, Mr. Jones raised the federal takings issue, citing to this Court's repeated statements that the application of a land use regulation will violate the Just Compensation Clause if it fails to substantially advance legitimate state interests. Nevertheless, the court below affirmed. In upholding the dismissal of Mr. Jones' complaint, the Court of Appeal rejected the two-pronged test for regulatory takings first established by this Court in *Agins v. City of Tiburon*, 447 U.S. 255 (1980):

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.

Id. at 260. Rejecting the sufficiency of Mr. Jones' allegations of a violation of *Agins'* first prong, the court below held that he was instead required to state facts showing a violation of *Agins'* ***second*** prong:

> [A] property owner must allege that he has suffered some constitutionally significant economic loss due to the regulation of rents on his property.

App. A-10. The appellate panel based this mistaken interpretation of the Fifth Amendment on decisions of the California Supreme Court, which has

> consistently held that loss of income through regulation of rents will constitute an unconstitutional taking of private property only upon a showing that the regulatory scheme imposed by the rent control law is so restrictive that it prevents the property owner from receiving a "fair return" on his or her property investment.

Id. Denial of a "fair return," of course, goes to the economic injury imposed by rent regulations--the second prong of *Agins*. It is wholly unrelated to the failure of the regulations to substantially advance legitimate interests as applied to a specific property.

Compounding its error, the court below went on to assert that, "*even if*" a regulatory taking claim could be stated under *Agins'* first prong, Mr. Jones would be required to show that the law was unconstitutional not only as applied to *his own* property, but as applied to *all rental property in Berkeley*!

> Among other stated purposes, the Ordinance is expressly intended "to regulate residential rent increases . . . and to protect tenants from unwarranted rent increases." . . .
>
> . . . Jones's inability to rent *his* property at rates the Board would permit does not demonstrate the Ordinance's failure to advance its purpose of protecting *all* Berkeley tenants from "unwarranted rent increases." . . . There are many possible reasons for Jones's predicament, but under no circumstances does his particular situation provide a basis for proving the Ordinance does not generally serve its

> purposes in the city. The facts pleaded are simply insufficient to meet the threshold criteria for a takings challenge under *Agins*, *Nollan*, and *Dolan*.

App. A-12-13 (footnote omitted).

In other words, completely ignoring the Rent Control Law's disastrous effects on housing availability for low and fixed-income persons, minorities, students, the handicapped, and the aged, the court below held the law was immune to constitutional challenge so long as it could be presumed to hold rents below market for at least one property anywhere in the City of Berkeley. What this means is that a plaintiff cannot state a claim for an as-applied regulatory taking under *Agins'* first prong without also showing that the law is unconstitutional on its face (*i.e.*, fails to advance any legitimate state interest with respect to any and all potential plaintiffs, "no matter how it is applied." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)). This holding reflects much more than an elementary misunderstanding of the distinction between facial and as-applied takings claims. Rather, it resurrects and recasts an error of the South Carolina Supreme Court that was remedied by this Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Whereas the state court in *Lucas* held that no as-applied taking would be found under *Agins'* ***second*** prong so long as the regulatory scheme could be presumed to advanced some legitimate governmental purpose on its face, the court below has resurrected this erroneous doctrine and applied it in the context of claims brought under *Agins'* ***first*** prong.

REASONS FOR GRANTING THE PETITION

I

UNDER THE TWO-PRONGED TEST SET FORTH BY THIS COURT IN *AGINS v. CITY OF TIBURON*, THE FAILURE OF A LAND USE REGULATION TO SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS AS APPLIED TO A SPECIFIC PROPERTY IS SUFFICIENT TO SUPPORT A CLAIM FOR A REGULATORY TAKING REGARDLESS OF THE MEASURE'S FACIAL VALIDITY OR ITS IMPACT ON OTHER PROPERTIES

A. Either Prong of the Disjunctive Standard Set Forth in *Agins v. City of Tiburon* Is Independently Sufficient to State a Claim for an As-applied Regulatory Taking

Bailey Jones alleges that the Rent Board's application of the Rent Control Law to his property has effected an uncompensated regulatory taking in violation of the Fifth Amendment to the United States Constitution. The test for establishing such a claim was set forth by this Court in *Agins v. City of Tiburon*:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land.

447 U.S. at 260 (citations omitted). *Agins* plainly sets forth a disjunctive, two-pronged standard. Under this test, a regulatory taking must be found if land use regulations *either* fail to substantially advance legitimate state interests as applied to particular real property, *or* deprive an owner of economically viable use of his land. Either prong of the *Agins* standard is independently sufficient to establish a regulatory taking. The

independence of *Agins'* two prongs has been evident to all serious commentators who have considered the question:

> The Supreme Court in *Agins* plainly indicated that only one of these two prongs must be satisfied to establish a regulatory taking.

William A. Falik & Anna C. Shimko, *The "Takings" Nexus--The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 38 HASTINGS L. J. 359, 362 (1988).

> [A] landowner may recover for a "regulatory taking" if the regulation fails *either* of the two prongs.

Stephen R. McCutcheon, Jr., *Lessened Protection for Property Rights--The Conjunctive Application of the Agins v. City of Tiburon Disjunctive Test*, 27 Pacific L. J. 1657, 1664 (1996).

Nevertheless, the court below held that "under no circumstances" can Mr. Jones state a claim for a taking on the grounds that the Board's application of the Rent Control Law fails the first prong of *Agins* as applied to his property. App. A-13.

The ruling below clearly amounts to a state appellate court "overruling" this Court on a settled point of federal constitutional law. This Court has repeatedly stated--*and demonstrated*--that either prong of the *Agins* test is independently sufficient to state a claim for a regulatory taking *as applied to a plaintiff's specific property*. Indeed, twice in this decade this Court has found an as-applied regulatory taking in situations where it expressly recognized that one prong of *Agins* ***did not*** apply! The plaintiff in *Dolan v. City of Tigard*, an as-applied first prong case, could not plead deprivation of economically viable use, as was expressly noted by this Court. 512 U.S. at 385 n.6. Conversely, in *Lucas v. South Carolina Coastal Council*, an as-applied second prong case, this Court's opinion acknowledged that the law in question substantially advanced legitimate state interests.

505 U.S. at 1009-10. Nevertheless, a regulatory taking was found in both *Dolan* and *Lucas*.

The first prong of the disjunctive *Agins* test, establishing that a taking will be found if a property regulation fails to substantially advance legitimate state interests as applied to particular property, has been set forth by this Court in the context of challenges to zoning regulations, *Agins*, 447 U.S. at 260; *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 648 (1981), mining regulations, *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987), and coastal zone and wetlands development restrictions, *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1016; *United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985), and has been expressly held applicable to rent control. *Yee v. City of Escondido*, 503 U.S. at 530. A regulatory taking was found in *Nollan v. California Coastal Commission*, a case in which the plaintiff challenged the application of California's Coastal Act to a particular parcel of land, even though only the first prong of the *Agins* test was implicated. 483 U.S. at 834-37.

In *Yee v. City of Escondido*, 503 U.S. 519, this Court expressly stated that a rent control law's failure to substantially advance its stated goals may result in a regulatory taking. *Id.* at 530. If, as alleged in Mr. Jones' complaint, the Rent Board's application of the Rent Control Law has actually ***worsened*** rather than mitigated the social ills that justified its adoption, then the Board's continued application of that law is unconstitutional regardless of its economic impact on Mr. Jones' property. The ruling of the court below, that such facts do not state a claim under *Agins* unless the challenged measure has no impact on rent levels anywhere in the community, is a novel and dangerous repudiation of the fundamental regulatory takings doctrine of this Court.

B. This Case Is the Mirror Image of *Lucas*--an As-Applied Regulatory Takings Claim Implicating Only the First Prong of *Agins*

In 1991, the South Carolina Supreme Court directly challenged this Court's *Agins* doctrine in a manner that is perfectly analogous to the decision below. In *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (1991), the South Carolina high court opined that an as-applied regulatory taking could not be stated under *Agins'* ***second*** prong so long as the regulations at issue could be presumed to advance important state interests on their face. *Id.* at 899-900. This Court granted certiorari and reversed, reaffirming the vital principle that violation of either of *Agins'* two prongs constitutes a violation of the Just Compensation Clause with respect to a particular property. *Lucas*, 505 U.S. at 1030-32.

The only difference between the state *Lucas* decision and the opinion below is that this case implicates the first prong of *Agins*, rather than the second prong. By holding that Bailey Jones cannot state an as-applied takings claim under *Agins'* first prong without showing that the law fails to substantially advance any of its stated purposes with respect to any property, the court below has simply paraphrased the decision this Court reversed in *Lucas*.

As a dissenting Justice of the California Supreme Court recently noted:

> We as judges write judicial opinions and articulate legal standards because we believe that words, though imperfect, have the power to convey objective meaning.

Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993, 1037 (1999) (Chin, J., dissenting). If this Court's statement of the test for as-applied regulatory takings in *Agins* is to convey any objective meaning, ***both*** prongs of that test must provide independently sufficient grounds for finding a taking, regardless

of the impact of the regulation on other properties. This Court unequivocally established this fact with respect to *Agins'* second prong in *Lucas*. The present petition for certiorari should be granted in order to confirm the coequal status of *Agins'* first prong.

C. This Case Implicates a Well-Defined Property Interest and Thus Properly Comes Under the Purview of the Just Compensation Clause

In *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct 2131 (1998), this Court considered the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act) as applied to a specific plaintiff. The plurality decision recognized that purely economic regulation may properly be subjected to a takings analysis, requiring an "essentially ad hoc and fact intensive" inquiry to establish whether the measure imposes special burdens on a particular plaintiff that should, in justice and fairness, be borne by society as a whole. *Id.* at 2146. The plurality found that the Coal Act violated the Just Compensation Clause as applied to Eastern Enterprises, in part because of a lack of proportionality between the burdens imposed by the regulations and the plaintiff's individual contribution to the social ills the act was intended to address. 118 S. Ct. at 2153. In his concurring opinion, Justice Kennedy questioned whether an identifiable, protected property interest existed in that case, emphasizing "the importance of identifying the property allegedly taken, lest all governmental action be subjected to examination under the constitutional prohibition against taking without just compensation." *Id.* at 2156 (Kennedy, J. concurring).

In the case at bar there can be no question that the Rent Board's application of the Rent Control Law to Mr. Jones' property implicates a well-defined property interest protected under the Fifth Amendment. As this Court has often recognized, the right to the peaceful use and enjoyment of privately owned land is itself an essential, constitutionally protected property

interest. *See Nollan*, 483 U.S. at 833 n.2; *Lucas*, 505 U.S. at 1031. More specifically, under California law one of the interests inhering in the ownership of real property is the right to receive the rents and profits therefrom. *Callahan v. Martin*, 43 P.2d 788, 795 (1935). This right is a freely alienable property interest which is statutorily designated as a servitude. Cal. Civ. Code § 802(4); *see Callahan*, 43 P.2d at 794-95. Thus, unlike the situation that prompted Justice Kennedy's separate opinion in *Eastern Enterprises*, the regulatory taking claim at issue in this case plainly implicates an identified property interest that is entitled to protection under the Just Compensation Clause.

II

THE RULING BELOW, FORECLOSING THE POSSIBILITY OF PLEADING A REGULATORY TAKING UNDER THE FIRST PRONG OF *AGINS*, CONFLICTS WITH A RECENT DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

The holding of the court below, that a claim for a regulatory taking may not be pled under the first prong of *Agins* alone, conflicts with a recent decision of the United States Court of Appeals for the Ninth Circuit. In *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), the Court of Appeals struck down a rent control ordinance for failing to substantially advance its stated objectives--the same standard that was rejected by the court below. The Ninth Circuit expressly invoked this Court's admonition that a regulatory taking challenge to a rent control law may turn on "whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Id.* at 1165 (quoting *Yee v. City of Escondido*, 503 U.S. at 530).

The *Richardson* plaintiff, like Mr. Jones, raised a challenge under the first prong of *Agins*, alleging "that Ordinance 91-96 fails to substantially further its stated public purposes and,

therefore, constitutes a regulatory taking." *Id.* at 1164. The Court of Appeal agreed, finding that

> [l]and use regulations do influence the value of property, but to be constitutional, they must do so in a manner that substantially furthers a legitimate government interest. Ordinance 91-96 does not do this. It regulates the use of the lessors' property interests in a manner that does not substantially further the goal of creating affordable housing. . . . The Ordinance thus effects a regulatory taking.

Id. at 1165-66 (citation omitted).

Because of the California courts' refusal to entertain regulatory takings claims brought under *Agins*' first prong, rental property owners in California face radically different levels of protection under the Just Compensation Clause, depending on whether they pursue their claims in state or federal court. This Court should grant certiorari to resolve the conflict between the state courts of California and the Ninth Circuit Court of Appeals on this important question of federal constitutional law.

III

THE DECISION BELOW IS YET ANOTHER IN A LINE OF CALIFORNIA CASES THAT CONFLICTS WITH DECISIONS OF THE HIGHEST STATE COURT OF NEW YORK ON FEDERAL CONSTITUTIONAL ISSUES ARISING UNDER THE JUST COMPENSATION CLAUSE

In nearly 20 years since this Court's *Agins* ruling, the state courts of California have never once found a compensable regulatory taking under *either* prong of the disjunctive standard set forth in that case. Instead, the California judiciary has energetically devoted itself to limiting, restricting, and distinguishing this Court's regulatory takings holdings to ensure that no agency of government in that state will ever face the

discipline of the Just Compensation Clause.[3] In contrast, the highest state court of New York has fulfilled its judicial responsibilities by applying this Court's regulatory takings doctrine, specifically including the first prong of *Agins*. The resulting conflict between the courts of the most populous states of the Union on an important question of federal constitutional law can only be resolved by intervention by this Court.

In contrast to the ruling of the court below, the highest court of the State of New York has applied the first prong of

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[3] *See, e.g., Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164, 166 (1992) (holding that this Court's landmark regulatory takings decision in *Nollan v. California Coastal Commission* does not apply to regulatory takings); *Hensler v. City of Glendale*, 876 P.2d 1043, 1056-58 (1994) (holding that as-applied inverse condemnation claims brought under the Just Compensation Clause must be filed within a 90-day (or shorter) statute of limitations); *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th 1060, 1073-75 (1995) (holding that *Agins*' disjunctive regulatory taking standard is actually *conjunctive*, and plaintiffs are required to satisfy both prongs); *Ehrlich v. City of Culver City*, 911 P.2d 429, 437-47 (1996) (limiting *Nollan's* heightened standard of review to a small class of physical and monetary exactions imposed as conditions to the issuance of land use permits); *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, 865 (1997) (holding that a remedy under the Just Compensation Clause is not available in California if a due process remedy is "available and adequate"); *Landgate v. California Coastal Commission*, 953 P.2d 1188, 1197 (1998) (holding that just compensation is not available for the period of time required to obtain judicial relief from the government's wrongful deprivation of all economically viable use of plaintiff's land); *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 1002-05 (holding that plaintiffs are not entitled to put on evidence that the application of a rent control ordinance fails to substantially advance legitimate state interests under *Agins*). Many other California appellate decisions have followed these state court precedents; none have deviated from them so far as to award or uphold an award of just compensation for a regulatory taking.

Agins to find compensable takings arising from overzealous regulation of private rental property. In *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (1989), the New York Court of Appeals overturned Local Law 9, a regulation that prohibited the conversion or demolition of single room occupancy (SRO) residential hotels. The stated purpose of the ordinance was to alleviate homelessness by increasing the availability of SRO housing. A group of owners sued the city, arguing that, *inter alia*, Local Law 9 violated the Just Compensation Clause by failing to substantially advance its admittedly legitimate objectives.

Partly because of evidence that Local Law 9 could not significantly advance its stated goal of relieving homelessness, the state high court found that "the nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural." 542 N.E.2d at 1069. In contrast, the court below refused even to allow Bailey Jones to put on evidence concerning the relationship of the Rent Control Law and the advancement of its stated purposes.

Five years after *Seawall*, the New York Court of Appeals applied this Court's *Dolan* decision to find a regulatory taking in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (1994). In striking down a rent control measure under the Just Compensation Clause, the New York panel observed that *Nollan* and *Dolan* "establish a constitutional minimum floor of protection which this Court lacks authority to diminish under the supremacy clause." *Id.* at 482. Applying the ends-means scrutiny required by this Court, the Court of Appeals found that the challenged measure effected a taking because it "suffers a fatal defect by not substantially advancing a closely and legitimately connected State interest" as required by *Nollan* and *Dolan*. *Id.* at 480.

The New York court addressed and rejected the very argument embraced by the court below:

> [W]e are satisfied that even if the economic impact aspect of this test were not to be satisfied, that feature alone could not defeat the owners' interests and claims in a controversy such as this, without consideration and fulfillment of the substantial State interest and close causal nexus prong of the governing test, even as to regulatory takings. . . . The sharply focused legal question under the controlling precedential and analytical principles may be reduced simply to whether the legislation is supported by a substantial State interest and close nexus.

Id. at 482, 486.

By rejecting the first prong of this Court's *Agins* analysis as an independently sufficient ground for finding a regulatory taking as applied to specific property, the court below has come into direct conflict with the rigorous application of this standard by the New York Court of Appeals. This Court should grant the petition for certiorari in order to resolve this conflict between the two largest states in the Nation, as well as the corresponding conflict between the state and federal courts in California, on important federal questions arising under the Just Compensation Clause.

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be GRANTED.

DATED: April, 1999.

Respectfully submitted,

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

BAILEY A. JONES,

Plaintiff and Appellant,

v.

A074359

CITY OF BERKELEY RENT STABILIZATION BOARD,

(Alameda County) Super. Ct. No. 743567-6

Defendant and Respondent;

D. SMITH et al.,

Real Parties in Interest.

_____/

This appeal concerns a challenge to the constitutionality of the City of Berkeley's rent control ordinance (the Ordinance).[1] In his complaint against Berkeley's Rent Stabilization Board (the Board), appellant Bailey A. Jones sought a judgment declaring the Ordinance unconstitutional as applied to him and a refund of registration fees he paid to the Board. Jones now appeals a judgment dismissing his complaint on the Board's motion for judgment on the pleadings. He contends his complaint sets forth sufficient facts to establish a cause of action for regulatory taking of his property in violation of the federal and California

[1] The Ordinance, entitled "Rent Stabilization and Eviction for Good Cause Ordinance," is codified as chapter 13.76 of the Berkeley Municipal Code beginning at section 13.76.010. Throughout this opinion, the City of Berkeley will be referred to as Berkeley.

Constitutions. (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §19.) We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Ordinance was enacted and became effective in 1980. Among its stated purposes are regulation of residential rent increases, protection of tenants from "unwarranted rent increases," maintenance of the "diversity of the Berkeley community," and advancement of "the housing policies of the city with regard to low and fixed income persons, minorities, students, handicapped, and the aged." (Berkeley Mun. Code, §13.76.030).[2] The Ordinance requires nearly all owners of residential property that is either being rented or made available for rent to register their units with the Board and pay annual registration fees. (Berkeley Mun. Code, §13.76.060 (F)(2), 13.76.080 (A), (D).)

Jones is the owner of five rental properties in Berkeley, containing a total of thirty-six residential units. Eighteen of these units were rented pursuant to section 8 of the United States Housing Act (42 U.S.C. § 1437f) and were therefore exempt from the registration and rent ceiling provisions of the Ordinance. (Berkeley Mun. Code, §13.76.050 (D).) Of the remaining 18 units subject to rent control, 5 units were vacant as of June 1994. Jones alleged the Board had set maximum

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[2] Berkeley Municipal Code section 13.76.030 states: "The purposes of this chapter are to regulate residential rent increases in the city of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the city of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of the city with regard to low and fixed income persons, minorities, students, handicapped, and the aged."

allowable rents higher than those he was actually receiving for the 13 occupied rent-controlled units. Despite his best efforts, he was unable to rent the five vacant units for the maximum allowable rent.

On June 27, 1994, Jones paid the Board $1,515 in annual registration fees and included a letter protesting payment. On August 12, he submitted a Government Code section 905 claim to the Berkeley City Attorney, requesting a refund of the $1,515. On September 6, following the instructions of the city attorney's office, Jones submitted his refund claim directly to the Board. The Board denied Jones's claim on September 12, 1994.

Jones filed his initial complaint against Berkeley and the Board, seeking a refund of the registration fees and a declaratory judgment that the Ordinance is unconstitutional. After the trial court granted Berkeley's demurrer without leave to amend and the demurrer of the Board with leave to amend, Jones filed his first amended complaint against the Board alone, naming his individual tenants as real parties in interest.

In his first amended complaint, Jones alleged: (1) the maximum rents established by the Board for his property are higher than the rents he is actually able to obtain on the open rental market; (2) between 1980 and 1990, Berkeley's stock of rental housing units declined by more than 12 percent, while the supply of rental units in every comparable city of Northern California without rent control increased; (3) during that period, the number of low-income and very low-income renter households in Berkeley decreased by more than 2,000, contrary to the trend in all comparable Northern California cities without rent control; (4) during that decade, the number of college students living in Berkeley declined by 700, contrary to the trend in all comparable Northern California cities without rent control; and (5) at the same time, the number of senior citizens living in Berkeley increased by less than 1 percent, a smaller increase than would be accounted for by the natural aging of the 1980

population, also contrary to the trend in all other Northern California cities without rent control.

The first amended complaint alleged the application of the Ordinance to Jones's property has failed to substantially advance any legitimate governmental interest and the burdens it imposes on his property, in the form of annual registration fees, are not proportional to any social harms that would otherwise be caused by the unregulated use of the property. On this basis, Jones argued the Board's imposition of annual registration fees constitutes a regulatory taking of his property in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the California Constitution.[3]

The Board filed a motion for judgment on the pleadings. After a hearing, the trial court granted the motion and entered judgment against Jones. The court found that Jones had failed to allege a cause of action for unconstitutional taking because he had not alleged any serious economic injury, either by being denied a fair return on his property or by being prevented from realizing any viable use for the property. This appeal followed.

DISCUSSION

"A motion for judgment on the pleadings is analogous to a general demurrer." (*Lance Camper Manufacturer Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 198; *Barker v. Hull* (1987) 191 Cal.App.3d 221,224.) On appeal from the

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[3] The relevant provision of the Fifth Amendment to the United States Constitution, commonly referred to as the takings clause, states: ". . . [N]or shall private property be taken for public use without just compensation." The comparable provision in the California Constitution, found at Article I, section 19, reads in pertinent part: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."

grant of a motion for judgment on the pleadings, the standard of review is the same as that applicable to a judgment following the sustaining of a demurrer. (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 815, 825; *Fosgate v. Gonzales* (1980) 107 Cal.App.3d 951, 957.) Like a demurrer, a motion for judgment on the pleadings is confined to the face of the pleading under attack, and all facts alleged are deemed admitted. We must give the complaint a reasonable interpretation by reading it as a whole, viewing all parts in their context. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 679, fn. 31; *Lance Camper*, supra, at p. 198.) We are not bound by the trial court's determination but are required to render our independent judgment on whether a cause of action has been stated. (*Lance Camper*, supra, at p. 198; *Hoffman v. State Farm Fire & Casualty Co.* (1993) 16 Cal.App.4th 184, 189.)

The central allegation of Jones's first amended complaint is that the Ordinance has effectively reduced the availability of private rental housing in Berkeley and made it more difficult for low-income renters, students, and the elderly to obtain affordable housing, without protecting them from unwarranted rent increases. Jones contends this allegation, that the Ordinance has had a negative effect on the Berkeley rental housing market in violation of its statement of purpose, is sufficient to state a cause of action for unconstitutional taking of property, even though he has not alleged *any* economic damage to himself other than the payment of the annual registration fees to the Board.

Jones challenges the trial court's finding that there can be no taking of property without a showing of "serious economic injury." Citing a number of recent decisions by the United States Supreme Court, Jones argues there are two distinct tests for finding a regulatory taking: *either* (1) the challenged ordinance does not substantially advance legitimate state interests; *or* (2) the ordinance denies an owner economically viable use of the land. (*Dolan v. City of Tigard* (1994) 512 U.S. 374, 385

(Dolan); *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1016; *Yee v. Escondido* (1992) 503 U.S. 519, 534; *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 834 (*Nollan*); *United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121, 126; *Agins v. Tiburon* (1980) 447 U.S. 255, 260 (*Agins*).) The original statement of these alternative tests is found in *Agins, supra*: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, [citation], or denies an owner economically viable use of his land, [citation]."[4] (447 U.S. at p. 260.)

Jones argues that these are independent, *alternative* tests. By his reading of the law, a regulation affecting real property may be deemed a taking if it can be shown that it does not substantially advance any legitimate state interest, whether or not the regulation causes the complaining landowner any significant economic injury. In fact, Jones contends he can state a cause of action for a taking without alleging that his own property has suffered any appreciable economic injury at all. Neither *Agins* nor any subsequent case citing it has explicitly addressed the question of whether, under this disjunctive statement of the test, a land-use regulation may effect a taking even if it has absolutely no negative economic effect on the subject property.

Nevertheless, as interpreted by our Supreme Court in *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 (*Ehrlich*), the recent decisions in *Nollan* and *Dolan* suggest that in certain cases governmental action may amount to a taking if a

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[4] In language not cited by *Jones*, the Supreme Court continued: "The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, [citation], the question necessarily requires a weighing of private and public interests." (*Agins, supra*, 447 U.S. at pp. 260-261 .)

challenged ordinance does not substantially advance legitimate state interests, whether or not there has been substantial economic harm to the landowner. This test requires the finding of both an "essential nexus" between the challenged regulatory exaction and the legitimate governmental purpose assertedly justifying the regulation, and a "rough proportionality" in nature and extent between the government regulation and the projected impact of the proposed private action. (Nollan, supra, 483 U.S. at pp. 835-838; *Dolan*, *supra*, 512 U.S. at pp. 386-391.) However, as Justice Arabian pointed out in *Ehrlich*, the "heightened standard of scrutiny" reflected in *Nollan* and *Dolan* is "triggered by a relatively narrow class of land use cases--those exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation." (12 Cal.4th at p. 868.)[5]

In *Nollan*, the California Coastal Commission required residential property owners to grant a lateral easement for public access across the seaside of their beachfront property as a condition for approval of a building permit to construct a larger beach house. (483 U.S. at p. 828.) In *Dolan*, the City of Tigard, Oregon, required the plaintiff to dedicate a portion of her property to public use as a pedestrian and bicycle pathway as a condition for granting a building permit allowing her to expand her business. (512 U.S. at pp. 377-380.) Thus, in both cases, local governments conditioned the approval and issuance of development permits on specific land-use restrictions or dedications that would have amounted to uncompensated requisitions of private property for public use but for the claim the conditions were justified by the ultimate police power to deny a permit altogether. (*Ehrlich*, *supra*, 12 Cal.4th at p. 868.)

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[5] This portion of the *Ehrlich* plurality opinion by Justice Arabian was joined in by Justice Werdegar, making it the opinion of the court. (*See Ehrlich*, *supra*, 12 Cal.4th at p. 912 (conc. and dis. opn. of Werdegar, J.).)

As the court stated in *Ehrlich*, "[S]uch a discretionary context presents an inherent and heightened risk that local government will manipulate the police power to impose conditions *unrelated* to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation. . . . It is the imposition of land-use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*." (*Ehrlich, supra*, 12 Cal.4th at p. 869, italics in original.)

In Ehrlich, our Supreme Court extended the *Nollan/Dolan* analysis to situations in which the local government has imposed special monetary exactions on an individual and discretionary basis. The court expressly contrasted such specific, individual exactions with situations in which generally applicable fees or assessments are imposed on a broad class of property owners in a nondiscretionary, ministerial fashion. In such cases, the *Ehrlich* court found there is less risk of an extortionate use of the police power to impose unconstitutional conditions. (12 Cal.4th at p. 876.)[6] Thus, where a regulatory exaction takes the form of

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[6] "There is no question that the takings clause is specially protective of property against *physical* occupation or invasion . . . . It is also true, as the city points out, that government generally has greater leeway with respect to noninvasive forms of land-use regulation, where the courts have for the most part given greater deference to its power to impose broadly applicable fees, whether in the form of taxes, assessments, user or development fees . . . imposed on a broad class of property owners. Fees of this nature may indeed be subject to a lesser standard of judicial scrutiny than that formulated by the [United States Supreme Court] in *Nollan* and *Dolan* because the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present. Nonetheless, we reject the proposition that *Nollan* and *Dolan* are entirely without application to

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such a generally applicable fee or assessment, ". . . the courts have deferred to legislative and political processes to formulate 'public program[s] adjusting the benefits and burdens of economic life to promote the common good.' [Citation.]" (Id. at p. 881.)

The facts of this case clearly distinguish it from those cases to which the *Nollan/Dolan/Ehrlich* analysis applies. The Ordinance requires all owners of nonexempt residential rental dwelling units in Berkeley to register these units and pay annual registration fees to the Board. These fees are determined on a standardized per-unit basis established by the Board, an elected body responsible to the voters. (Berkeley Mun. Code, §§ 13.76.060 (A), (D), (N), (P); 13.76.080 (D).) Unlike the specific $280,000 mitigation fee imposed on the particular developer in *Ehrlich* as a condition for approval of his request that his property be rezoned to permit construction, the annual registration fees imposed under the Ordinance apply generally to *all* Berkeley property owners offering nonexempt residential units for rent, and are imposed ministerially rather than on an individual and discretionary basis. Moreover, Jones has not alleged that any exaction or restriction imposed on him by the Ordinance interferes in any way with his use of his property. To the contrary, he has alleged that the allowable rent levels established by the Board are actually ***higher*** than the rents he is able to obtain on the open market.

Numerous cases have upheld rent control ordinances against attacks comparable to the one in this case, made on the ground of alleged unconstitutionality under the takings clauses of the federal and state Constitutions. The United States Supreme

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[6] (...continued)

monetary exactions. When such exactions are imposed--as in this case--neither generally nor ministerially, but on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered." (*Ehrlich, supra*, 12 Cal.4th at pp. 875-876, italics in original.)

Court has repeatedly affirmed the right of local governments to regulate housing conditions in general, and the landlord-tenant relationship in particular, without paying compensation for all economic injuries that may be caused by such regulation. (*Yee v. Escondido, supra*, 503 U.S. at pp. 528-529; *Pennell v. San Jose* (1988) 485 U.S. 1, 9-12; *FCC v. Florida Power Corp.* (1987) 480 U.S. 245, 252-254; *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 440.) Thus, a property owner must allege that he has suffered some constitutionally significant economic loss due to the regulation of rents on his property.

The California Supreme Court has twice considered facial challenges to the legality of Berkeley's rent control law. It has consistently held that loss of income through regulation of rents will constitute an unconstitutional taking of private property only upon a showing that the regulatory scheme imposed by the rent control law is so restrictive that it prevents the property owner from receiving a "fair return" on his or her property investment. (*Fisher v. City of Berkeley*, supra, 37 Cal.3d at p. 686; see also *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 165.) The Courts of Appeal have upheld similar rent control ordinances in the face of takings and due process challenges. (*Donohue v. Santa Paula West Mobile Home Park* (1996) 47 Cal.App.4th 1168, 1176-1180; *Yee v. Mobilehome Park Rental Review Bd.* (1993) 17 Cal.App.4th 1097, 1104- 1105; *Sandpiper Mobile Village v. City of Carpinteria* (1992) 10 Cal.App.4th 542, 546-551 (*Sandpiper*); *West Hollywood Concerned Citizens v. City of West Hollywood* (1991) 232 Cal. App.3d 486, 496-499; *Casella v. City of Morgan Hill* (1991) 230 Cal.App.3d 43, 49-58.) No court in this state has ever held that payment of a regulatory fee, generally applicable to all affected property owners and fairly administered as part of a rent control ordinance, constitutes a taking of property.[7]

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[7] We note that several recent California appellate court decisions preceding the Supreme Court's decision in *Ehrlich* have held that a

(continued...)

[7] (...continued)
regulatory taking cannot be established without a showing that the challenged ordinance or regulation denied the property owner economically viable use of his land. *(Del Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060, 1073-1080 (*Del Oro Hills*); *Westwinds Mobile Home Park v. Mobilehome Park Rental Review Bd.* (1994) 30 Cal.App.4th 84, 95 (*Westwinds*); *Sandpiper, supra*, 10 Cal.App. 4th at pp. 549-551.) As stated in *Del Oro Hills*: "[T]he focus of both parts of the test [stated in *Nollan*, *Dolan*, and *Agins*] is on whether property has been taken without just compensation, not on whether a regulation is in the abstract an invalid one; the inquiry must be what effect the regulation has on affected property owners." (*Del Oro Hills, supra*, 31 Cal .App.4th at pp. 1074-1075.) The court further stated, ". . . [W]e cannot accept [the] theory that satisfaction of one element of the *Agins* test (i.e., that there was an invalid regulation) is enough to establish a taking as a matter of law. In *Nollan*, *Lucas* [*v. So. Carolina Coastal Council, supra*, 505 U.S. 1003], and *Dolan*, the United States Supreme Court's analysis of the taking issue inextricably interlinked both the regulation's validity and the question of whether any economically beneficial use of the property remained in light of the regulation. In light of later authority, *Agins* did not establish an 'either/or' type of test." (*Del Oro Hills, supra*, at p. 1079.)

Generally speaking, we agree with the decisions of the Courts of Appeal in these cases that it is for legislative bodies, not the courts, to determine whether the economic objectives of a regulatory ordinance are advanced by the ordinance's effects in practice. (*Del Oro Hills, supra*, 31 Cal.App.4th at pp. 1074-1075; *Westwinds, supra*, 30 Cal. App.4th at p. 95, fn. 8; *Sandpiper, supra*, 10 Cal.App. 4th at p. 551.) In light of *Ehrlich*, however, the continuing force of these decisions may be in question, insofar as they suggest that a finding of a *regulatory* taking requires a showing that the property owner has been denied all economically viable use of his land.

In a letter submitted after oral argument, counsel for Jones directs our attention to the recent decision of Division Five of this district, *152 Valparaiso Associates v. City of Cotati* (1997) Daily
(continued...)

Even if we ignore this long line of California authority upholding the Ordinance and others like it, and assume for the sake of argument that a challenge to the Ordinance may be cognizable under recent regulatory takings jurisprudence, we nevertheless conclude that the trial court properly granted the motion for judgment on the pleadings. Jones has failed to allege sufficient facts to show the Ordinance does not substantially advance a legitimate state interest.

Among other stated purposes, the Ordinance is expressly intended "to regulate residential rent increases . . . and to protect tenants from unwarranted rent increases . . . ." These have been held to be legitimate governmental interests. (*Yee v. Escondido, supra*, 503 U.S. at pp. 528-529; *Pennell v. San dose, supra*, 485 U.S. at pp. 9-13; *Fisher v. City of Berkeley, supra*, 37 Cal.3d at

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[7] (...continued)
Journal 97 D.A.R. 9336 (*Cotati*). *Cotati* is distinguishable on its facts. In Cotati, the plaintiff landlords sought a rent increase sufficient to give them "a fair return on their investment in . . . capital improvements," but the Cotati rent board "refused to grant *any* such increase." As a result, the plaintiffs were denied any return on their capital investments. (*Ibid.*) In contrast, Jones has never alleged that the Board denied him a fair return on his investment. To the contrary, he concedes that the rents permitted by the Board were actually higher than the rents he could collect on the rental market. Thus, unlike in *Cotati*, Jones asks this court to conclude an uncompensated taking has taken place when there has been *no* "serious economic injury" to his return on his property.

Of course, Jones argues that he need not plead and prove serious economic injury at all. In support of this argument, he cites expansive language in *Cotati* applying a regulatory takings analysis based solely on the challenged regulation's failure to substantially advance a legitimate state interest. (*Cotati, supra*, 97 D.A.R. at p. 9338.) However, this discussion in *Cotati* is unnecessary to the conclusion it reaches. As the *Cotati* court is careful to emphasize, the plaintiffs there were denied *any* fair return on their real property investment. (*Id.* at pp. 9337-9338.)

pp. 679-682, 690-691; *Birkenfeld v. City of Berkeley, supra*, 17 Cal.3d at pp. 153-165.) The only factual allegation in Jones's complaint purporting to address the question whether there is a constitutionally sufficient nexus between the practical effect of the Ordinance and these legitimate objectives is his allegation that the maximum rents established by the Board for Jones's *own* property are *higher* than the rents he has actually been able to obtain for vacant units on the open rental market. Specifically, the complaint alleges: "Because the maximum rents established by the Rent Board for [Jones's] properties were in excess of what he could charge for these units in an unregulated market, the Rent Control Law *as applied* is demonstrably irrelevant to its stated purpose of protecting renters from unwarranted rent increases." (Italics added.)

This allegation has a fatal logical defect. Jones's inability to rent *his* property at rates the Board would permit does not demonstrate the Ordinance's failure to advance its purpose of protecting *all* Berkeley tenants from "unwarranted rent increases." There are many possible reasons for Jones's predicament, but under no circumstances does his particular situation provide a basis for proving the Ordinance does not generally serve its purposes in the city. The facts pleaded are simply insufficient to meet the threshold criteria for a takings challenge under *Agins*, *Nollan*, and *Dolan*.[8]

As a commercial property owner, Jones objects to the fee imposed on his holdings. His recourse, under the facts presented

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[8] Because we determine that Jones has failed to allege facts sufficient to show the Ordinance fails to substantially advance the legitimate governmental interest of protecting tenants from unwarranted rent increases, we need not address the separate issue of whether or not the Ordinance advances any of its other stated purposes, such as "maintain[ing] the diversity of the Berkeley community" and "advanc[ing] the housing policies of the city with regard to low and fixed income persons, minorities, students, handicapped, and the aged."

here, is to the policymakers in his community. Generally, it is for the Legislature to weigh and resolve economic and social arguments over rent controls. In the final analysis, this is a political debate. (*Ehrlich, supra*, 12 Cal.4th at p. 881; *Westwinds, supra*, 30 Cal.App.4th at p. 95, fn. 8; *Sandpiper, supra*, 10 Cal.App.4th at p. 551 .) Although reasonable minds may differ on the wisdom or efficacy of the Ordinance, it is for the courts to adjudicate what is legal, not impose their view of what is wise.

DISPOSITION

The judgment is affirmed.

Corrigan, J.

We concur:

Phelan, P.J.

Parrilli, J.

Appendix B-1

Filed 03/09/99

First Appellate District, Division Three No. A074395

SO64321

IN THE SUPREME COURT OF CALIFORNIA

BAILEY A. JONES, Appellant

v.

CITY OF BERKELEY RENT STABILIATION BOARD,
Respondent, D. SMITH et al., Real Parties in Interest

Pursuant to rule 29.4(c), California Rules of Court, the above-entitled review is DISMISSED and cause is remanded to the Court of Appeal, First Appellate District, Division Three.

George
Chief Justice

Mosk
Associate Justice

Kennard
Associate Justice

Werdegar
Associate Justice

Chin
Associate Justice

Associate Justice

Associate Justice

Appendix C-1

Filed 11/25/97

1/3 No. A074395
SO64321
IN THE SUPREME COURT OF CALIFORNIA

BAILEY A. JONES, Appellant
v.
CITY OF BERKELEY RENT STABILIATION BOARD,
Respondent, D. SMITH et al., Real Parties in Interest

Petition for review GRANTED.

Further action in this matter is deferred pending consideration and disposition of a related issue in *Santa Monica Beach Limited v. Superior Court*, S052824 (see Cal. Rules of Court, rule 29.2(c)), or pending further order of the court. Submission of additional briefing, pursuant to California Rules of Court, rule 29.3, is deferred pending further order of the court.

George
Chief Justice

Kennard
Associate Justice

Baxter
Associate Justice

Werdegar
Associate Justice

Chin
Associate Justice

Appendix C-2

Brown

Associate Justice

Associate Justice

Appendix D-1

Filed 4/17/96

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

BAILEY A. JONES, Plaintiff, vs. CITY OF BERKELEY RENT STABILIZATION BOARD, Defendant.	NO. 743567-6 **JUDGMENT**
CITY OF BERKELEY RENT STABILIZATION BOARD, Cross-complainant and Defendant, vs. Bailey A. Jones, Cross-defendant and Plaintiff.	
D. SMITH, et al., Real Parties in Interest.	

This Court, having on March 14, 1996 granted defendant City of Berkeley Rent Stabilization Board's motion for judgment on the pleadings pursuant to Code of Civil Procedures § 438 and the complaint not being open to amendment, and the cross-complaint having been voluntarily dismissed by the Board pursuant to a stipulation of the parties, now therefore

IT IS ORDERED, ADJUDICATED, AND DECREED that the complaint shall be dismissed with prejudice and that plaintiff Bailey A. Jones shall take nothing by this action.

Dated: Apr. 17 1996

/s/ RICHARD A. HODGE
JUDGE OF THE SUPERIOR COURT

Filed 3/14/96

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

BAILEY A. JONES, Plaintiff, vs. CITY OF BERKELEY RENT STABILIZATION BOARD, Defendant.	NO. 743567-6 **ORDER GRANTING DEFENDANT RENT BOARD'S MOTION FOR JUDGMENT ON THE PLEADINGS** --- **Code of Civil Procedure § 438**
CITY OF BERKELEY RENT STABILIZATION BOARD, Cross-complainant and Defendant, vs. Bailey A. Jones, Cross-defendant and Plaintiff.	
D. SMITH, et al., Real Parties in Interest.	

Defendant City of Berkeley Rent Stabilization Board's Motion for Judgment on the Pleadings pursuant to Code of Civil Procedures § 438 came on regularly for hearing by the Court at 9:00 a.m. in Department 81 on March 7, 1996. The parties were represented by their respective counsel.

After consideration of the Motion and the points and authorities submitted in support of and in opposition to the Motion and having heard and considered the arguments of counsel, the court holds as follows:

IT IS THEREFORE ORDERED that the Rent Board's Motion for Judgment on the Pleadings be granted. Plaintiff fails to allege a cause of action for an unconstitutional taking because he has not alleged the predicate serious economic injury, *i.e.* that he is being denied a fair return on his property or is being prevented from realizing any viable use for the property. *See West Hollywood Concerned Citizens v. City of West Hollywood* (1991) 232 Cal.App.3d 486, 496-500. The allegation the Rent Ordinance does not substantially advance its purpose is inadequate on its own to state a cause of action for a taking. See *Del Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060, 1079.

Dated: 3/17/96

/s/ RICHARD A. HODGE
JUDGE OF THE SUPERIOR COURT

IX. RENT STABILIZATION

Chapter 13.76

RENT STABILIZATION AND EVICTION FOR GOOD CAUSE PROGRAM

13.76.010 Title.

This chapter shall be known as the Rent Stabilization and Eviction for Good Cause Ordinance. (Ord. 5467-NS § 1, 1982; Ord. 5261-NS § 1, 1980.)

13.76.020 Findings.

A. The Housing Element of the Berkeley Master Plan of 1977 states that:

1. Berkeley residents have the right to decent housing in pleasant neighborhoods which meet standards of adequacy at a range of prices they can afford. (Goal 1)

2. Existing housing should be maintained and improved. (Goal 2)

3. Berkeley should have an adequate supply of housing throughout the city for persons with special needs. (Goal 3)

4. All residents should have equal access to housing opportunities, financing and insurance on a non-discriminatory basis. (Goal 4)

B. On June 6, 1972, the electorate of the city of Berkeley passed a rent control charter amendment that was later voided by the California Supreme Court as being unconstitutional.

C. On June 5, 1973, the city council declared the existence of a housing emergency in the city of Berkeley, based upon the council's finding of a pattern of steadily rising rents, a

shortage of decent housing and an increased deterioration of the existing housing stock in the city.

D. On November 7, 1978, the electorate of the city of Berkeley passed a renter property tax relief ordinance.

E. On October 25, 1979, the Berkeley City Council, Berkeley Housing Authority, the Berkeley Housing Advisory and Appeals Board, and members of the city's administrative staff held a public workshop regarding the current housing conditions in Berkeley.

F. On October 30, 1979, January 26, 1980 and February 21, 1980, the Berkeley City Council held public hearings at which members of the public expressed their views regarding current housing conditions in Berkeley and legislative proposals for rent stabilization and eviction controls.

G. The most significant provisions of the 1978 Renter Property Tax Relief Ordinance expired on December 30, 1979.

H. On November 27, 1979, the Berkeley City Council passed an ordinance establishing a temporary rent stabilization program, effective until June 30, 1980. (Ord. 5467-NS § 2, 1982: Ord. 5261-NS § 2, 1980.)

13.76.030 Purpose.

The purposes of this chapter are to regulate residential rent increases in the city of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the city of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of the city with regard to low and fixed income persons, minorities, students, handicapped, and the aged. (Ord. 5467-NS § 3, 1982: Ord. 5261-NS § 3, 1980.)

. . .

13.76.050 Applicability.

This chapter shall apply to all real property which is being rented or is available for rent for residential use in whole or in part, except for the following:

A. Rental units which are owned by any government agency. However, the exemption of units owned by the Berkeley Housing Authority from the terms of this chapter shall be limited to their exemption from the terms of Section 13.76.080, Rent Registration; Section 13.76.100, Establishment of Base Rent Ceiling and Posting; Section 13.76.110, Annual General Adjustment of Rent Ceilings; and Section 13.76.120, Individual Adjustments of Rent Ceilings, of this chapter.

B. Rental units which are rented primarily to transient guests for use or occupancy less than fourteen consecutive days in establishments such as hotels, motels, inns, tourist homes, and rooming and boarding houses. However, the payment of rent every fourteen days or less shall not by itself exempt any unit from coverage by this chapter.

C. Rental units in nonprofit cooperatives owned and controlled by a majority of the residents.

D. Rental units leased by the Berkeley Housing Authority under the Section 23 program (42 U.S.C., Section 1421b) or rental units leased to tenants assisted under the Section 8 program (42 U.S.C. Section 1437f). However, except as may be preempted by state or federal law, the exemption of such rental units from the terms of this chapter shall be limited to Section 13.76.080, Rent Registration; Section 13.76.100, Establishment of Base Rent Ceiling and Posting; Section 13.76.110, Annual General Adjustment of Rent Ceilings and Section 13.76.120, Individual Adjustments of Rent Ceilings, of this chapter.

E. Rental units in any hospital, skilled nursing facility, health facility, asylum, or non-profit home for the aged.

F. Rental units in a residential property which is divided into a maximum of four units where one of such units is occupied by the landlord as his/her principal residence. Any exemption of rental units established under this subsection (13.76.050 F.) shall be limited to rental units that would have been exempt under the provisions of this chapter had this chapter been in effect on December 31, 1979.

After July 1, 1982, this exemption shall no longer apply to rental units in a residential property which is divided into three or four units. It shall continue to apply to rental units in a residential property which is divided into two units, and which meet all the other requirements of this subsection (13.76.050 F). Rental units which become nonexempt under this provision shall have the provisions of subsections 13.76.080I and 13.76.100C. applied to them.

G. A rental unit in a residential property where the landlord shares kitchen or bath facilities with the tenant(s) of such rental unit and where the landlord also occupies a unit in the same property as his/her principal residence.

H. For the purposes of subsections 13.76.050 F. and G., the term landlord shall be defined only as the owner of record holding at least fifty percent interest in the property.

I. Newly constructed rental units which are completed and offered for rent for the first time after the effective date of this chapter, provided that such new units were not created as a result of rehabilitation or conversion as opposed to new construction. However, the exemption of such newly constructed units shall be limited to their exemption from the terms of Section 13.76.080, Rent Registration; Section 13.76.100, Establishment of Base Rent Ceiling and Posting; Section 13.76.110, Annual General Adjustment of Rent

Ceilings; and Section 13.76.120, Individual Adjustments of Rent Ceilings, of this chapter.

J. A rental unit which is rented by a nonprofit, accredited institution of higher education tenant or tenants who are student(s), faculty, or staff of the institution or of a member school of the Graduate Theological Union, provided, however, that the institution owned the unit as of January 1, 1988.

(Ord. 5872-NS § 2, 1988; Ord. 5467-NS § 5, 1982: Ord. 5261-NS § 5, 1980.)

13.76.060 Rent stabilization board.

A. Composition. There shall be in the city of Berkeley an elected rent stabilization board; the board shall consist of nine Commissioners. The board shall elect annually as chairperson one of its members to serve in that capacity.

. . .

F. Powers and duties. The elected rent stabilization board shall have the power to determine, to arbitrate and to set rent levels, whether through general or individual adjustments, of any unit which has controlled rents under any Berkeley Ordinance, and to administer any Berkeley program which regulates rents and evictions. The board shall have the following powers and duties:

1. Set the rent ceilings for all rental units.

2. Require registration of all rental units under Section 13.76.080.

3. Publicize the manner in which the base rent ceiling is established under Section 13.76.100.

4. To make adjustments in the rent ceiling in accordance with Sections 13.76.110 and 13.76.120.

5. Set rents at fair and equitable levels in view of and in order to achieve the purposes of this chapter.

6. To issue orders, rules and regulations, conduct hearings and charge fees as set below.

7. Make such studies, surveys and investigations, conduct such hearings, and obtain such information as is necessary to carry out its powers and duties.

8. Report annually to the city council of the city of Berkeley on the status of rental housing units covered by this chapter.

9. Request the city council to remove rent controls under Section 13.76.060Q.

10. Administer oaths and affirmations and subpoena witnesses and relevant documents.

11. Establish rules and regulations for settling civil claims under Section 13.76.150.

12. Seek injunctive relief under Section 13.76.150.

13. Pursue civil remedies in courts of appropriate jurisdiction.

14. Intervene as an interested party in any litigation brought before a court of appropriate jurisdiction by a landlord or tenant with respect to rental units covered by this chapter.

15. Hold public hearings.

16. Charge and collect registration fees, including penalties for late payments.

17. Other powers necessary to carry out the purposes of this chapter which are not inconsistent with the terms of this chapter.

18. Except as provided in section 13.76.060N of this chapter, the board shall finance its reasonable and necessary expenses for its operation without the use of general fund monies of the city of Berkeley.

. . .

N. Financing. The board shall finance its reasonable and necessary expenses by charging landlords annual registration fees in amounts deemed reasonable by the board. Such registration fees shall not be passed on to tenants in the form of rent increases except with the express prior approval of the board. The board is also empowered to request and receive funding, when and if necessary, from the city of Berkeley and/or any other available source for its reasonable and necessary expenses.

. . .

13.76.080 Rent registration.

A. The board shall require all landlords subject to the provisions of this chapter to file with the board by September 1, 1980 a rent registration statement for each rental unit covered by this chapter. . . .

. . .

D. The first annual registration fee of twelve dollars per unit shall be paid by the landlords to the board no later than September 1, 1980. Subsequent annual registration fees set in accordance with Section 13.76.060N of this chapter shall be paid no later than July 1 of each year. Because fees charged in years prior to 1991 were due On September 1 but paid for board expenses from each preceding July 1, the fee due in 1991 shall be calculated to pay for twelve months of board expenses.

. . .

F. Every annual registration fee required by this chapter which is not paid on or before July 1 is declared delinquent, and the board shall add to said registration fee and collect a penalty of one hundred percent of the fee so delinquent in addition to the fee. Every six months that the fee and penalty remain delinquent, the penalty shall be increased by one hundred percent of the original fee. . . .

. . .

K. Registration fees shall not be passed along to the tenants without the express, prior approval of the board. Under no circumstances shall penalties be passed along to tenants.

. . .

13.76.100 Establishment of base rent ceiling and posting.

A. Base Rent Ceiling. Upon adoption of this chapter, no landlord shall charge rent for any rental unit covered by the terms of this chapter affecting rents in an amount greater than the lawful rent which was actually due and payable on, or last preceding May 31, 1980, under the periodic term of the rental agreement, in accordance with the provisions of the Temporary Rent Stabilization Ordinance, No. 5212-N.S., except as permitted by the board under Sections 13.76.110 and 13.76.120 of this chapter. . . .

. . .

13.76.190 Criminal penalties.

Any landlord who is found by a court of competent jurisdiction to be guilty of a willful violation of this chapter shall be subject to up to a five hundred dollar fine and/or ninety days in jail for a first offense and up to a three thousand dollar fine and/or one year in jail for any subsequent offenses. (Ord. 5467-NS § 19, 1982.)

Supreme Court, U.S.
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No. 98-1774

IN THE
Supreme Court of the United States

BAILEY A. JONES,

Petitioner,

v.

CITY OF BERKELEY RENT STABILIZATION BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is the legitimacy of a local ordinance under the Takings Clause determined without regard to the economic effect on the party invoking the clause?

LIST OF PARTIES

The Petition does not list the parties below. They were Bailey A. Jones, plaintiff and appellant; City of Berkeley Rent Stabilization Board, defendant and respondent; and D. Smith, A. White, A. Jones, C. Adala, K. Adala, K. Nunn, D. Kukua, C. Johnson, E. Esquivel, S. Mantz, J. Nichols, D. Edwards, T. Mack, T. Mathews, J. Brown, J. McDonald, E. Itzep-Castro, S. Portillo, J. Adanilson, P. Taquiej, R. Rilea, S. Trapp, J. Ferrigno, D. Bradley, S. Williams, J. Rogers, L. Harris, T. Okuyama, T. Wang, Q. Chen, F. Lee, V. Washington, M. Tesfamariam, E. Yihdego, and A. Davis, real parties in interest.

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STATEMENT OF THE CASE

The voters of the city of Berkeley, California adopted a Rent Stabilization and Eviction for Good Cause Ordinance (the "Ordinance") in June 1980, succeeding a series of short-term rent controls which had started on November 7, 1978. (Petitioner's Appendix – "PA" – at F-2.) Between December 1978 and July 1983 Petitioner Bailey A. Jones acquired 36 rental units in Berkeley, of which 18 were subject to rent control in June 1994. (Respondent's Appendix – "RA" – at 4a.)

In November 1994 (RA at 7a), Mr. Jones filed the action below, alleging that the Ordinance fails to substantially advance a legitimate state interest and is therefore invalid under the Takings Clause of the Fifth Amendment. (RA at 5a-6a, 8a.)

Petitioner alleges that in June 1994 the maximum rents allowed for each of his regulated units exceeded what he could in fact obtain for the units from tenants or prospective tenants. (RA at 4a-5a.) He does not allege that other owners were similarly situated. Because his rents were below the allowable maximums in 1994, Petitioner alleges that the Ordinance is "demonstrably irrelevant" to one of its stated purposes, preventing unwarranted rent increases.[1] (RA at 5a.) Petitioner also alleges that the Ordinance has reduced the amount of rental housing made available by other owners – apparently as a result of lowering their rents – and that this has caused low-income households, students and the elderly to live elsewhere, contrary to another of its stated purposes. (RA at 5a-6a.)

---

1. This allegation does not extend to any of the Ordinance's other stated purposes. *Compare* PA at F-2, § 13.76.030.

The action below also asserts that the registration fee collected under the Ordinance is not proportional to "any harm that could result from the unregulated use of Mr. Jones' properties". (RA at 8a.) Petitioner's June 1994 annual registration fee (for all covered units) totaled $1,515. (RA at 6a.)

The California Court of Appeal determined that Petitioner had not alleged that he suffered any "appreciable economic injury". (PA at A-6.) It therefore concluded that he could not pursue a Takings Clause claim that the Ordinance did not substantially advance a legitimate state interest. (PA at A-13.) The Court of Appeal also determined that the registration fee which Petitioner paid, a standardized fee imposed ministerially on all owners of covered units, was not subject to the rough proportionality standard. (PA at A-9.)

REASONS FOR DENYING THE PETITION

The court below correctly barred Petitioner's action because he alleged no appreciable economic injury stemming from the alleged pernicious effect of the Ordinance. In addition, Petitioner's claim is time-barred, and Petitioner lacks standing to raise it in this Court because Petitioner is not one of those protected by his theory of relief. Finally, Petitioner's ultimate argument on the merits relies on judicial willingness to sit in judgment on the wisdom of policy, an enterprise on which the courts will not embark.

I.

PETITIONER ALLEGES NO ECONOMIC INJURY WHICH CAN SUSTAIN A TAKINGS CLAIM

American courts have long heeded Justice Holmes' warning that they do not sit to assess the wisdom or correct the mistakes of legislators. *See Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting). The Takings Clause does not change this. While there is a place in takings analysis for the question of whether a challenged law substantially advances a legitimate state interest, that place presupposes a significant economic injury to a recognizable property interest.

A. The Takings Clause Does Not Come Into Play Without a Relevant Injury.

The Petition does not identify any case which relies on the Takings Clause to invalidate a statute or ordinance for failure to advance a legitimate interest, in the absence of a significant injury to a recognizable property interest of the party challenging the law. To grant relief here, this Court would have to direct the California courts to invoke the Takings Clause even where no such injury is alleged, a direction out of keeping with the underlying purpose of that clause and the fundamental principle of separation of powers evoked by Justice Holmes.

Petitioner's sole alleged economic injury is payment of an annual registration fee of approximately $1,500, covering 18 apartments. (RA at 6a, 8a.) Petitioner does not allege that paying this registration fee in any meaningful way disrupts Petitioner's investment-backed expectations

— a doubly unlikely event since the Petition covers property purchased after rent controls were instituted. (RA at 4a.) Nor does Petitioner allege any effect on the value of his property. Indeed, since Petitioner positively asserts that his rents are lower than the Ordinance permits, he essentially concedes that under the Ordinance his property retains its value. (RA at 4a-5a.)

The facts in this case stand in sharp contrast to those in existing authority. In *Agins v. Tiburon*, 447 U.S. 255 (1980), cited by Petitioner as the source of the Takings Clause requirement that a zoning law substantially advance a legitimate state interest, the plaintiff alleged a $2,000,000 loss in value of a five-acre parcel of undeveloped land. *See Agins v. Tiburon*, 598 P.2d 25, 27 (Cal. 1979), *aff'd*, 447 U.S. 255 (1980). In *Nectow v. Cambridge*, 277 U.S. 183 (1928), cited by *Agins* as the source of this requirement, a special master found that no practical use could be made of the plaintiff's land under the challenged zoning. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), involved dedication of a classic real property interest, an easement. *Dolan v. City of Tigard*, 512 U.S. 374 (1994), involved dedication of land. Both *Nollan* and *Dolan* involved conditions prerequisite to development of property; the opportunity to develop is itself a significant aspect of property ownership. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, No. 97-1235, 1999 U.S. LEXIS 3631 (U.S. May 24, 1999), a combination of city requirements rendered 37.6 acres of residentially zoned land undevelopable. In the rent control context, as for rate regulation in general, deprivation of a "fair return" has generally been the test for constitutional injury. *See, e.g.*, *Pennell v. San Jose*, 485 U.S. 1, 13 (1988) (upholding against substantive due process challenge a tenant hardship

provision as consistent with "ensuring at the same time that landlords are guaranteed a fair return on their investment").

In contrast, Petitioner does not allege that he is denied a fair return, or deprived of any other recognized property interest. He asserts only that he has paid the modest cost necessary to permit administration of the Ordinance (including its housing quality protections and eviction rules).[2] Levies to cover such costs, in the form of license and business taxes as well as "fees", are common to regulated professions and businesses ranging from real estate brokerage to construction contracting to law to horse racing. However imperfectly conceived or ineffective the resulting regulation, such fees and other levies have not given rise to takings claims. To suggest that they should do so trivializes the Takings Clause.

B. Routine Fees Do Not Give Rise to Takings Claims.

This Court and other federal courts have consistently held that the Takings Clause addresses injuries to property, not routine obligations to pay money to a government body. In *United States v. Sperry Corporation*, 493 U.S. 52 (1989), this Court held unanimously that Sperry had "not identified any of its property that was taken" when it was charged a user fee because it fell under the jurisdiction of the Iran-United States Claims Tribunal. *Id.* at 59. The Court did so even though Sperry had brought its claim, and secured it by attachment, before the tribunal came into existence and also, when establishment of the tribunal prevented it from pursuing its claim elsewhere, had settled the claim without

2. Petitioner has omitted the Ordinance sections touching on these points from Petitioner's Appendix. Because their terms are not involved in the Court's decision on the Petition, Respondent's Appendix also does not include them.

the participation or assistance of the tribunal. *Id.* at 56. The fee was 1-1/2% of $2.8 million or approximately $42,000. *Id.* at 56, 58. Without reaching any other Takings Clause issue, the Court held that assessment of a user fee to pay for the cost of government service was not a taking. The opinion distinguishes *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), as involving the appropriation of interest on interpleader accounts with no justification whatsoever other than the "bare transfer of private property to the county". *Sperry*, 493 U.S. at 62 n.8.

The Ninth Circuit reached a conclusion similar to *Sperry* in *Individuals for Responsible Government, Inc. v. Washoe County*, 110 F.3d 699 (9th Cir. 1997), *cert. denied*, 522 U.S. 966 (1997), holding that a county-wide fee for garbage collection, even if charged to residents who did not use county garbage service, could not be a taking within the meaning of the Takings Clause. 110 F.3d at 704.

Traditionally, Fifth Amendment property interests have been defined by reference to state law. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 518-19 (1987) (Rehnquist, J., dissenting). Here, the highest California court to consider the case did not identify any property interest under state law, but rather found that

> annual registration fees imposed under the Ordinance apply generally to *all* Berkeley property owners offering non-exempt residential units for rent, and are imposed ministerially rather than on an individual and discretionary basis. Moreover, Jones has not alleged that any exaction or restriction imposed on him by the Ordinance interferes with his use of his property.

(PA at A-9 (original emphasis).)

For reasons set forth in Justice Kennedy's concurrence in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131 (1998), the Court has "been careful not to lose sight of the importance of identifying the property allegedly taken, lest all governmental action be subjected to examination" under the Takings Clause. 118 S. Ct. at 2156 (Kennedy, J., concurring). If the Takings Clause were expanded so it could apply whenever a regulatory scheme has, as regulation usually does, some ancillary monetary effect on those who are regulated, it will open an unfortunate new chapter in Fifth Amendment jurisprudence. For example, may defendants object to court filing fees as takings because the right of action pleaded against them does not substantially advance a legitimate state interest? Did the nationwide 55-mile per hour speed limit give rise to a cause of action for doctors, construction workers or others who drove long distances to work in sparsely populated states (such as Nevada or Wyoming) if it reduced their hours of paying work without reducing accidents? The Takings Clause should not be applied, potentially changing the standard for reviewing a public policy, because the policy is administered through a standardized fee. Here, paying a fee certainly does not illuminate with concrete facts the allegation that the Ordinance is a taking.

Eastern Enterprises and *Webb's Fabulous Pharmacies, Inc.* do not suggest loosening the link between the Takings Clause and damage to recognizable property interests. Rather, the two cases are examples of a narrow group of cases in which government legislates a transfer of funds based solely on the public or private transferee's need, without any connection between the transferor and the need for the transfer. In those cases, the focus is on the payment itself, and whether the payers are the right parties to bear

the payments, not on whether the benefits which are financed substantially advance a legitimate state interest. Here, in contrast, the costs of regulation are logically borne by the affected industry. Petitioner does not allege that the Rent Board's formula for recovering its costs through regulatory fees imposes a disproportionate share of those costs on Petitioner or that the fees in the aggregate are excessive or were misappropriated.[3] Petitioner's concern is not with the amount or proportionality of the fee, but with the program which it supports.

C. Petitioner Cannot Pursue This Case Based on the Injuries of Others.

Lacking an actionable injury of his own, Petitioner cannot piggyback on the hypothetical injuries of a wholly different class of property owners on whom the Ordinance has the more typical effect of limiting rents. Ordinarily, one person may not attack a statute "on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines*, 362 U.S. 17, 21 (1960). No exception to this rule should be made here, where the effect on others is diametrically opposed to the alleged effect on Petitioner. Petitioner's essential argument for invalidating the Ordinance is that it has lowered rents so much that owners have reduced the available housing stock and driven out deserving tenants. (RA at 5a-6a.) This argument cannot apply to Petitioner, whose rents are allegedly unaffected.

---

3. Though the action below did not proceed far enough to create a record on this point, Petitioner has been authorized to recover the lion's share of these fees from his tenants through annual general rent increases, calculated by the Rent Board to allow recovery of its fee increases.

Petitioner is profoundly mistaken in construing the holding below as resting on the conclusion that a Takings Clause plaintiff must show not only that a challenged enactment fails to substantially advance a legitimate state interest but also that the plaintiff has been deprived of substantially all use of or value of his property. The court below held no such thing. Rather, it rejected Petitioner's claim that "he can state a cause of action for a taking without alleging that his own property has suffered *any* appreciable economic injury at all." (PA at A-6 (emphasis added); *see also* PA at A-5, referring to "serious economic injury".) In contrast, to hold that an economic effect as inconsequential, as universal under the regulatory scheme, and as irrelevant to the underlying theory of injury as the one claimed here gives rise to a takings claim, would indeed be a dramatic change in the law.

II.

PETITIONER'S INVERSE CONDEMNATION CLAIMS ARE TIME BARRED

Petitioner's complaint below alleges a federal claim based directly on the Fifth Amendment. The opportunity to challenge the Ordinance on its face under the Fifth Amendment expired long before Petitioner filed the complaint below.

Because neither the Fifth Amendment nor other federal authority contains a statute of limitations for Petitioner's claim, reference is made to the analogous state statute. *See Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). The California statute of limitations for a facial regulatory takings challenge is five years. *See Sandpiper Mobile*

Village v. City of Carpinteria, 12 Cal. Rptr. 2d 623, 627 (Ct. App. 1992), *cert. denied*, 507 U.S. 1032 (1993); Cal. Civ. Proc. Code § 319 (West 1999). The ordinance which Petitioner challenges was adopted in 1980 (PA at F-1, § 13.76.010), based on predecessor ordinances adopted in November 1978 and November 1979 (PA at F-2, § 13.76.020 (D), (G), (H)). Petitioner acquired his properties between December 1978 and July 1983 and has owned them continuously since. (RA at 4a.) He has since been required to pay and has paid registration fees yearly. *Id.* Plainly, the statute has expired for a facial challenge.

Petitioner attempts to avoid this time bar by pleading an "as applied" claim. He bases his claim that the Ordinance does not substantially advance any legitimate governmental interests on facts subsequent to enactment of the Ordinance. (RA at 5a-6a, 8a.) However, these facts concern the Ordinance as a whole and are in no way particular to Petitioner. They do not convert this facial challenge into as an-applied one.

No authority permits a litigant to subject the general validity of legislative enactments to recurring and repetitive scrutiny as long as they remain in effect, based on their alleged effects from year to year. Pleading generic facts about the Ordinance should not convert this to an as-applied case or avoid the statute of limitations. Ruling on similar facts, the Ninth Circuit found that the statute of limitations applicable to facial claims barred allegations that another California rent control ordinance failed to substantially advance its purpose "as applied". That court noted that the alleged "as applied" effect was "not a particular application of the statute", but (as in this case) arose "from the existence of the statute itself." *Levald, Inc. v. City of Palm Desert*,

998 F.2d 680, 689 (9th Cir. 1993), *cert. denied*, 510 U.S. 1093 (1994).

Even assuming, however, that Petitioner's challenge to the across-the-board effect of the Ordinance were an as-applied challenge, the facts he alleges occurred "between 1980 and 1990". (RA at 5a.) It is thus virtually certain from the face of the complaint that it remains untimely even on an as-applied theory. If any of the effects which Petitioner alleges occurred before November 10, 1989 — less than two months before the end of the alleged ten-year period from 1980 to 1990 — than the statute had expired before the initial complaint was filed. It is vanishingly unlikely that the Ordinance did not have the consequences which Petitioner alleges for more than nine years, then achieved an actionable effect in a matter of months at the end of 1989. Under California law, the statute of limitations begins to run when the facts giving rise to the cause of action accrue. *See* Cal. Civ. Proc. Code § 312 (West 1999). Here, though the record below is not developed,[4] the inference that a cause of action had accrued before November 10, 1989 is almost inescapable.

Finally, continuing payment of registration fees does not convert the complaint below into a cause of action accruing in 1994. From the face of the complaint, it appears that Petitioner has been paying registration fees continuously since at least 1983. (RA at 4a.) Any cause of action concerning the continuing provisions of the Ordinance that could have accrued as a result of paying

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4. In California, a statute of limitations defense may be presented as late as trial. *See Ventura County Employees' Retirement Ass'n v. Pope*, 151 Cal. Rptr. 695, 707 (Ct. App. 1978).

registration fees would have done so some eleven years or more before filing of the complaint, well beyond the statute of limitations. Allowing a continuing nuisance, or "rolling", statute of limitations under these circumstances would thoroughly defeat any time limitation on challenging a statute which continued in force; each day a would-be litigant was affected by the statute would give rise to a new cause of action. This is inconsistent with established California law. *See, e.g., Sandpiper Mobile Village v. City of Carpinteria*, 12 Cal. Rptr. 2d 623, 627 (Ct. App. 1992), *cert. denied*, 507 U.S. 1032 (1993).

III.

PETITIONER LACKS STANDING TO PURSUE THIS ACTION BEFORE THIS COURT.

Petitioner's challenge is based on an alleged injury which appears to be novel in the lengthening history of constitutional challenges to rent control. Typically, injury is alleged due to the loss of otherwise obtainable rents. *See, e.g., Pennell v. San Jose*, 485 U.S. 1, 8 (1988), holding that the "probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain . . . , is a sufficient threat of actual injury to satisfy" standing requirements. Petitioner here, however, alleges that no rent of any unit which he owns is reduced by the Ordinance. (RA at 4a-5a.) Based on Petitioner's own allegations, he has not lost rental income due to the Ordinance and has no standing to challenge it.

Petitioner does allege that for the 36 rental units he owned, 18 of which had rents regulated by the Ordinance

at the time of his complaint,[5] he paid annual registration fees totaling $1,515. (RA at 4a, 6a.) However, his case that the Ordinance is invalid rests on the argument that rent control has reduced the availability of housing, thus driving low income households, college students and the elderly out of Berkeley. (RA at 5a-6a.) Petitioner does not, and could not plausibly, allege that landlords are withdrawing units from the rental market to avoid a registration fee of roughly $100 per unit per year. He does not allege that he has withdrawn units. This case thus rests on an argument that the Ordinance is invalid because it affects other landlords — whose rents presumably are reduced by rent control — in a way wholly different from the way it affects Petitioner. Petitioner cannot achieve standing vicariously based on an injury which others may suffer but he does not.

Petitioner's registration fees, although a modest expense and not one (for reasons explained in Section I above) which implicates the Taking Clause, may be sufficient "injury in fact" to allow this case to proceed before this Court under Article III. Payment of the registration fee does not, however, bring him within the "zone of interests" of the legal provision which forms the gravamen of his complaint. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 886 (1990). Petitioner appears singularly ill-suited to advance the claims of the majority of landlords subject to the Ordinance, which in all likelihood would be based on allegations that it *does* affect their rents.

---

5. As the complaint notes, the Ordinance does not regulate the rents of units during periods when they are rented to tenants holding certificates or vouchers under Section 8 of the United States Housing Act. (RA at 4a.)

That others might be able to allege injuries from the Ordinance in a way which might enable them to raise a claim under the Takings Clause does not avail Petitioner. *See Air Courier Conference of Am. v. American Postal Workers Union*, 498 U.S. 517, 523-30 (1991) (holding that postal unions could not challenge a decision to allow competition with the U.S. Postal Service, because competition was generally restricted in order to protect the availability of postal service, not employees' jobs); *Individuals for Responsible Gov't, Inc. v. Washoe County*, 110 F.3d 699, 702-04 (9th Cir. 1997), *cert. denied*, 522 U.S. 966 (1997) (holding that the expense to households which did not use county garbage service of a universal, county-wide collection fee was not within the zone of interest protected under the Commerce Clause, which would have applied, if at all, to protect competitors in an adjacent state); *Cone Corp. v. Florida Dep't of Transp.*, 921 F.2d 1190, 1203-06, 1210 (11th Cir. 1991), *cert. denied*, 500 U.S. 942 (1991) (holding that general contractors did not have standing to challenge a requirement that they use minority subcontractors based on clerical and procedural burdens, absent evidence that they had been denied contracts).

With respect to claims based on alleged affects on other landlords, drastically different from the Ordinance's alleged effects on him, Petitioner cannot show "such a personal stake on the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination. . . ." *Baker v. Carr*, 369 U.S. 186, 204 (1962), cited in *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 217-18 (1974). With respect to the claim that he should pay no registration fee because rent control does not (or did not in 1994) reduce his rents, Petitioner does not allege other landlords are similarly situated, and his own situation does not rise to a level of significance which should concern this Court.

IV.

REACHING THE UNDERLYING ISSUE WHICH PETITIONER PUTS FORWARD WOULD INAPPROPRIATELY INVOLVE THE COURTS IN MAKING A LEGISLATIVE DECISION.

Deciding whether a legislative enactment substantially advances a legitimate state interest, in the absence of any effects particular to the complaining litigant, would necessarily involve the courts in reassessing the very decisions for which legislatures are responsible. Moreover, these matters are localized and fact-intensive. This case involves the policy of a moderate-size California city, whose situation as the home of a large university located in the core of one of the country's most expensive housing markets renders its apartment rental situation unusual even among the handful of California cities which regulate apartment rents. Extensive conflicting evidence would surely be presented in any ensuing trial, including contested comparisons of housing and population statistics from arguably comparable cities. This Court may appropriately wonder what the judicial system can ultimately accomplish in this kind of case.

At this stage the Petition raises only the question of whether Petitioner has alleged an economic injury sufficient for him to invoke the Takings Clause. The answer to that question only matters, however, if it enables Petitioner to challenge the ultimate wisdom of the Ordinance. Petitioner cites no case which involves such legislative second guessing. This case will waste judicial resources at all levels unless the ultimate standard for reviewing legislation under the Takings Clause is to differ drastically from the standards which apply elsewhere.

Petitioner, for instance, relies on the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (RA at 7a-8a), a standard held inapposite to cases like this in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, No. 97-1235, 1999 U.S. LEXIS 3631, *29 (U.S. May 24, 1999). *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, __ U.S. __, 119 S. Ct. 168 (1998), also cited by Petitioner, required no weighing of evidence or policy. The *Richardson* court was able to determine that it was logically impossible for the challenged ordinance there, involving sales of condominiums in Honolulu, to advance to any degree its one stated purpose. 124 F.3d at 1165-66. The court distinguished the challenged law from "ordinary rent control ordinances", which were not subject to the same logic. *Id.* at 1164. *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989), *cert. denied*, 493 U.S. 976 (1989), and *Manocherian v. Lennox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995), also involved laws notable for their severe effects on property owners, to an extent arguably equivalent to depriving the owners of possessory rights. Neither court held that these effects on owners could have been justified simply by stronger evidence of benefits to other members of the public.

In contrast, Petitioner's underlying case here turns not on allegations of drastic effects on identifiable owners but on the claim that Berkeley voters made a mistake when they adopted the Ordinance, and that they will not recognize the alleged fact that they are defeating their own purposes. The interchangeable allegations in this case and in *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993 (Cal. 1999), *cert. denied*, No. 98-1512, 1999 U.S. LEXIS 3468 (U.S. May 24, 1999), evidence a dissatisfaction with rent control

policies broader than the facts attaching to any property, any alleged injury or any particular ordinance. The courts are not the place to determine whether this dissatisfaction is justified.

CONCLUSION

The Takings Clause does not authorize courts to act as grand inquisitors of whether legislation substantially advances legitimate interests. Petitioner should not be authorized to invoke the Fifth Amendment independently of identifiable injury to particular property, as the Petition requests. To grant this authority would be particularly inadvisable here, where the challenged legislation is nearly 20 years old, and where the allegations of its failure turn on facts affecting other property owners, but not Petitioner. Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF AND REFUND OF MONEY PAID DATED APRIL 3, 1995 AND FILED APRIL 4, 1995

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

No. 743567-6

BAILEY A. JONES,

Plaintiff,

v.

CITY OF BERKELEY RENT
STABILIZATION BOARD,

Defendant.

D. SMITH, A. WHITE, A. JONES, C. ADALA, K. ADALA, K. NUNN, D. KUKUA, C. JOHNSON, E. ESQUIVEL, S. MANTZ, J. NICHOLS, D. EDWARDS,

Appendix A

T. MACK, T. MATHEWS, J. BROWN, J. MCDONALD, E. ITZEP-CASTRO, S. PORTILLO, J. ADANILSON, P. TAQUIEJ, R. RILEA, S. TRAPP, J. FERRIGNO, D. BRADLEY, S. WILLIAMS, J. ROGERS, L. HARRIS, T. OKUYAMA, T. WANG, Q. CHEN, F. LEE, V. WASHINGTON, M. TESFAMARIAM, E. YIHDEGO, A. DAVIS, and DOES 1 through 99, inclusive,

Real Parties in Interest.

FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF AND REFUND OF MONEY PAID

Plaintiff, Bailey A. Jones, seeks a declaration under Code of Civil Procedure § 1060 that defendant, City of Berkeley Rent Stabilization Board (Rent Board), may not levy annual registration fees on certain property owned by Mr. Jones in the City of Berkeley. Plaintiff further seeks a refund of said fees paid under protest. By this verified complaint plaintiff alleges as follows:

PARTIES

1. Plaintiff, Bailey A. Jones, is the record owner, jointly with his wife, of residential rental property located at 2328 7th Street, 2335 7th Street, 2436 8th Street, 1128 Bancroft Way, and 1130 Bancroft Way, all in the City of Berkeley (properties). The properties are subject to rent control under Berkeley Municipal Code Chapter 13.76, the "Rent Stabilization and Eviction for Good Cause Program" (Rent Control Law).

2. Defendant, City of Berkeley Rent Stabilization Board, is the administrative agency charged with administering the provisions of the Rent Control Law and ordinances adopted pursuant thereto.

3. Real parties in interest D. Smith, A. White, A. Jones, C. Adala, K. Adala, K. Nunn, D. Kukua, C. Johnson, E. Esquivel, S. Mantz, J. Nichols, D. Edwards, T. Mack, T. Mathews, J. Brown, J. McDonald, E. Itzep-Castro, S. Portillo, J. Adanilson, P. Taquiej, R. Rilea, S. Trapp, J. Ferrigno, D. Bradley, S. Williams, J. Rogers, L. Harris, T. Okuyama, T. Wang, Q. Chen, F. Lee, V. Washington, M. Tesfamariam, E. Yihdego, and A. Davis are residents of Mr. Jones' properties under the terms of the Rent Control Law.

4. Plaintiff is ignorant of the true names and capacities of real parties in interest designated herein as Does 1 through 99, inclusive, and therefore designates these parties by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.

STATEMENT OF FACTS

5. The City of Berkeley has regulated the rental of private residential property within its jurisdiction continuously since the current Rent Control Law was enacted in 1980.

6. The stated purposes of the Rent Control Law, as set forth in Berkeley Municipal Code § 13.76.030, include the following: "[T]o protect tenants from unwarranted rent

increases" and to "advance the housing policies of the city with regard to low and fixed income persons, minorities, students, handicapped, and the aged."

7. Plaintiff Bailey A. Jones purchased the properties at issue at various times between December, 1978, and July, 1983. He has owned and maintained the properties for residential rental use continuously since acquiring them.

8. City of Berkeley Ordinance No. 6008-NS-1990, enacted pursuant to the Rent Control Law, requires owners of residential dwelling units that are rented or are available to rent to register these units and pay annual registration fees to the Rent Board. Mr. Jones has been required to pay, and has paid, the subject fees on the properties each year said fees have been imposed on them.

9. On or about May 23, 1994, pursuant to Ordinance No. 6008-NS-1990, the Rent Board presented Mr. Jones with bills for 1994-95 registration fees. After corrections and modifications, the total amount found to be due was $1,515.

10. The 5 properties owned by Mr. Jones contain a total of 36 residential rental units. As of June, 1994, 18 of these units were exempt from rent control under Section 8 of the United States Housing Act, and 5 of the remaining 18 units were vacant.

11. For each and every one of the 13 dwelling units rented by Mr. Jones that were subject to the Rent Control Law as of June, 1994, the Rent Board had established

maximum allowable rents in excess of the amount Mr. Jones was actually receiving in rent.

12. With respect to the five vacant dwelling units Mr. Jones owns that were subject to the Rent Control Law as of June, 1994, Mr. Jones had diligently offered to rent each and every one of these units at the maximum allowable rents established by the Rent Board but was unable to rent any of these five units.

13. Because the maximum rents established by the Rent Board for Mr. Jones' properties were in excess of what he could charge for these units in an unregulated market, the Rent Control Law as applied is demonstrably irrelevant to its stated purpose of protecting renters from unwarranted rent increases.

14. Residents of the City of Berkeley were subjected to rent control continuously between 1980 and 1990. Over this decade, Berkeley's stock of rental housing units declined by more than 12%, while the rental housing supply *increased* in all comparable Northern California cities without rent control. Because of the reduced availability of affordable housing caused by rent control, the number of low-income and very low-income renter households living in Berkeley decreased by more than 2,000 between 1980 and 1990. Over this same period the number of college students living in Berkeley declined by more than 700, and the number of elderly persons living in Berkeley increased by less than 1%, a smaller increase than would be accounted for by the natural aging of the 1980 population. In all cases, these trends were sharply contrary to comparable Northern California cities without rent control.

15. Because rent control has reduced the availability of private rental housing in Berkeley, and has made it more difficult for students, the elderly, and low-income renters to find affordable rental housing in Berkeley, the Rent Control Law is not substantially advancing its stated purpose of advancing the housing policies of the city with regard to these population groups.

16. On June 27, 1994, plaintiff Bailey A. Jones paid the $1,515 in 1994-95 registration fees demanded by the Rent Board. In a letter of protest accompanying his payment, Mr. Jones objected to the 1994-95 registration fees on the grounds that, *inter alia*, the Rent Control Law as applied to his property was not substantially advancing any legitimate governmental interest.

17. On August 12, 1994, Mr. Jones presented to the City of Berkeley a claim for refund in the amount of $1,515, pursuant to Government Code § 905. In compliance with the form provided by the city for this purpose, the claim was presented to the Berkeley City Attorney.

18. By letter dated August 30, 1994, Deputy City Attorney Bruce A. Soublet returned Mr. Jones' claim unprocessed with instructions that it should be redirected to the Rent Board.

19. On September 6, 1994, Mr. Jones presented his claim for refund to the Rent Board. The Rent Board formally denied Mr. Jones' claim for a refund by letter dated September 12, 1994.

20. On November 10, 1994, Mr. Jones filed a Complaint for Declaratory Relief and Refund of Money Paid, naming as defendants both the City of Berkeley and the Rent Board. On March 29, 1995, the Alameda County Superior Court granted the city's general demurrer without leave to amend, and granted the Rent Board's special demurrer with leave to amend within ten days by deleting the challenge to the constitutionality of the Rent Control Law or by naming the residents of Mr. Jones' properties as real parties in interest.

FIRST CAUSE OF ACTION (DECLARATORY RELIEF)

21. Every allegation contained in Paragraphs 1 through 20 above is repeated and repled as if set forth in full.

22. The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This federal prohibition was extended to the states through the Fourteenth Amendment. *Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897). A corresponding provision is included at Article I, Section 19, of the California Constitution.

23. To be constitutionally valid under the Takings Clause, the Rent Control Law must *substantially advance legitimate state interests*. *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). Moreover, the impact of fees or other burdens imposed by property regulations must be *roughly proportional* to social harms

that would otherwise be caused by the owner's use of his property. *Dolan v. City of Tigard*, 512 U.S. __, 129 L. Ed. 2d 304, 320 (1994). The burden of proof is on the Rent Board to demonstrate that the Rent Control Law, as applied to Mr. Jones, meets these constitutional standards. *Dolan*, 129 L. Ed. 2d at 320 n.8.

24. The Rent Control Law does not substantially advance any legitimate governmental interest. The primary effect of Berkeley's rent control scheme has been to reduce the supply of affordable housing in Berkeley. The shortage of affordable housing created by rent control has disproportionately burdened the poor, the elderly, students, young families, and other especially vulnerable groups. Therefore, the application of the Rent Control Law to Mr. Jones is invalid as a regulatory taking of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19, of the California Constitution.

25. Requiring Mr. Jones to pay annual registration fees of $1,515 is not roughly proportional to any harm that could result from the unregulated use of Mr. Jones' properties. The Rent Board has established allowable maximum rents for the properties that exceed the amount for which these accommodations can be rented in the open market. In other words, the rent levels imposed under rent control are actually higher than the rents Mr. Jones could obtain in the absence of regulation. Imposing the subject fees therefore comprises a regulatory taking of Mr. Jones' property in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19, of the California Constitution.

Appendix A

26. The Rent Board's decision was final on September 12, 1994; Mr. Jones has exhausted his administrative remedies; this action is timely filed.

27. An actual controversy exists between the parties in that Mr. Jones believes the imposition of annual registration fees on his properties violates his constitutional rights, whereas defendant Rent Board believes the fees may be validly imposed.

28. Mr. Jones desires a judicial determination of the rights and duties of the parties, including a declaration regarding the validity of imposing annual registration fees on his properties.

WHEREFORE, plaintiff prays for judgment as hereinafter set forth.

SECOND CAUSE OF ACTION (REFUND)

29. Every allegation contained in Paragraphs 1 through 28 above is repeated and replied as if set forth in full.

30. Because the Rent Control Law is unconstitutional as applied to Mr. Jones' properties, the Rent Board erred in denying his claim for refund of $1,515 in 1994-95 registration fees, and Mr. Jones is lawfully entitled to a refund of said fees.

WHEREFORE, plaintiff prays for judgment as set forth below:

Appendix A

PRAYER

Based upon the allegations above, plaintiff prays for judgment against defendant City of Berkeley Rent Stabilization Board as follows:

1. for a declaration that the City of Berkeley's Rent Control Law is unconstitutional as applied to plaintiff Bailey A. Jones, and that Mr. Jones may not be required to pay registration fees to the Rent Board pursuant to the Rent Control Law;

2. for a refund of the $1,515 in 1994-95 registration fees Mr. Jones paid under protest, plus statutory interest;

3. for costs of suit including reasonable attorneys' fees; and

4. for such other or further relief as the Court deems just and proper.

DATED: April 3, 1995.

Respectfully submitted,

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By s/ R.S. Radford
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(3)

Supreme Court, U.S.
FILED
JUN 14 1999
CLERK

No. 98-1774

In the

Supreme Court of the United States

BAILEY A. JONES,
Petitioner,

v.

CITY OF BERKELEY RENT STABILIZATION BOARD,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal for the First Appellate District

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Pursuant to Supreme Court Rule 15.6, Petitioner Bailey A. Jones hereby replies to the Respondent's Brief in Opposition (Opp.) filed by respondent City of Berkeley Rent Stabilization Board (Rent Board) on June 4, 1999.

I

THE COURT MUST TAKE THIS OPPORTUNITY TO CLARIFY THE APPLICABILITY OF THE FIRST PRONG OF *AGINS*

The Rent Board's opposition, like the court below, directly repudiates this Court's regulatory takings doctrine. The Board's position is clearly set forth at the outset:

> While there is a place in takings analysis for the question of whether a challenged law substantially advances a legitimate state interest, that place presupposes a significant economic injury to a recognizable property interest.

Opp. at 3. This central theme is repeated throughout the opposition brief, *e.g.*:

> [A] Takings Clause plaintiff must show not only that a challenged enactment fails to substantially advance a legitimate state interest but also that the plaintiff has been deprived of substantially all use of or value of his property.

Opp. at 9. Thus, the Rent Board collapses the ***first*** prong of the regulatory takings inquiry enunciated by this Court in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (application of a property regulation effects a taking "if the ordinance does not substantially advance legitimate state interests"), into a subset of the ***second*** prong (application of a property regulation effects a taking if it "denies an owner economically viable use of his land"). This argument is not original with the Rent Board or with the court below. Instead, it represents the settled doctrine of the state courts of California--a doctrine that is wholly at odds

with this Court on a fundamental question of rights secured by the Fifth and Fourteenth Amendments to the Federal Constitution.

In its original formulation in *Agins*, this Court was clear that the two prongs of the regulatory takings analysis are disjunctive; a taking will be found if ***either*** prong is violated. This initial understanding has been underscored and applied by this Court on many subsequent occasions. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("A land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'"); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992) ("As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'"); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) ("We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'"); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987) ("We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.'"); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) ("the application of land-use regulations to a particular piece of property is a taking only 'if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land'").

This Court emphasized the independence of the two prongs of *Agins* in *Yee v. City of Escondido*, 503 U.S. 519 (1992), noting that a first prong challenge

> does not depend on the extent to which [the property owners] are deprived of the economic use of their particular pieces of property.

Id. at 534. Similarly, Justice Scalia noted in his concurring and dissenting opinion in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), "[k]nowing the nature and character of the particular property in question, or the degree of its economic impairment, will in no way assist" in determining whether a taking has occurred under *Agins*' first prong. *Id.* at 18-19 (Scalia, J., concurring in part and dissenting in part).

Nevertheless, these repeated clear statements of the independent viability of *Agins*' first prong have been ignored and repudiated by the California courts. In *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th 1060 (1995), the California Court of Appeal broke with this Court and proclaimed that it would apply *Agins* as if the two prongs were *conjunctive* rather than, as this Court has always required, *disjunctive*. *Id.* at 1079. The resulting rule, which remains the doctrine of the California courts[1] and is now urged by the Rent Board in its opposition, is that a regulatory taking will only be found if the challenged measure or action fails to substantially advance legitimate state interests *and* deprives an owner of economically viable use of his property.

The difference between this Court's *Agins* formulation and the distortion of that doctrine applied to federal takings claims raised in California courts is best depicted graphically:

---

[1] *See, e.g., Landgate v. California Coastal Commission*, 953 P.2d 1188, 1198 (Cal. 1998) (no taking where plaintiff has been temporarily deprived of ***all*** economically viable use of his property, so long as there is a "sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the former may be said to substantially advance the latter").

UNITED STATES SUPREME COURT	*Does the government action substantially advance legitimate state interests?*		
		Yes	No
Does the government action deprive an owner of economically viable use of his land?	Yes	Taking	Taking
	No	No Taking	Taking

CALIFORNIA COURTS	*Does the government action substantially advance legitimate state interests?*		
		Yes	No
Does the government action deprive an owner of economically viable use of his land?	Yes	No Taking	Taking
	No	No Taking	No Taking

Under this Court's *Agins* formulation, the application of a restrictive property regulation will survive a takings challenge only if it ***both*** substantially advances legitimate interests ***and*** does not deprive the owner of economically viable use. Under the doctrine of the California courts, as advocated by the Rent Board's opposition brief, the same regulatory intrusion would survive a Fifth Amendment takings challenge if it ***either*** substantially advances legitimate interests ***or*** does not deprive the owner of economically viable use. Opp. at 3-5, 7-8, 9. Plainly, this is an inadequate level of protection of rights

supposedly guaranteed by the United States Constitution. As one commentator has pointed out,

> While *Agins* and its progeny increased the burdens placed upon land use regulators to ensure that individual citizens were not singled out to disproportionately bear the costs of implementing societal goals, adoption of the conjunctive standard [by the California courts] effectively eliminates that burden.

Stephen R. McCutcheon, Jr., *Lessened Protection for Property Rights--The Conjunctive Application of the Agins v. Tiburon Disjunctive Test*, 27 Pac. L.J. 1657, 1693 (1996).

II

THE CONFLICT AMONG THE STATE AND FEDERAL COURTS ON THE VIABILITY OF REGULATORY TAKINGS CLAIMS BROUGHT UNDER THE FIRST PRONG OF *AGINS* IS SPREADING AND DEMANDS THE PROMPT ATTENTION OF THIS COURT

The Rent Board does not--indeed, it cannot--dispute the existence of fundamental conflicts among the state and federal courts on the constitutional issue raised by this case. *See* Petition for Certiorari at 12-16. The Board's attempts to distinguish these cases merely emphasize how deep the conflicts run. For example, the opposition brief tries to minimize the conflict with *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), by observing that "it was logically impossible" for the ordinance challenged in that case to substantially advance its stated purpose. Opp. at 16. Thus, the Board finds it appropriate for a court to hold a rent control law unconstitutional under Agins' first prong by *weighing the measure's logic*, but would bar access to the courts to plaintiffs like Jones, who wish to advance an identical claim based on *factual evidence*. Surely this is a bizarre concept of the role of

the courts in adjudicating claims! *Richardson* clearly represents an irreconcilable conflict between the Ninth Circuit Court of Appeals and the California state courts on the legal viability of *Agins*' first prong.

The Board is less creative in its attempt to distinguish the conflicting opinions of the New York Court of Appeals, merely asserting that these cases "involved laws notable for their severe effects on property owners." Opp. at 16. This of course begs two essential questions: whether the plaintiffs in those cases alleged violations of *Agins*' first prong and, if so, whether the highest state court of New York found such allegations sufficient to state a claim for a regulatory taking. The answer to both those questions is "yes." In *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989), the state's high court devoted a major part of its opinion to ruling that Local Law 9 effected a taking by violating *Agins*' first prong--a standard the court clearly stated to be independent of the other "threshold test" for a regulatory taking, deprivation of economically viable use:

> It is basic . . . that such a burden-shifting regulation of the use of private property will, ***without more***, constitute a taking: (1) if it denies an owner economically viable use of his property, ***or*** (2) if it does not substantially advance legitimate State interests. ***Either*** would be sufficient to invalidate a property-use regulation.

Id. at 1065-66 (emphasis added) (citations omitted).

Similarly, the New York court addressed the constitutional question at issue in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), in the following terms:

> The precise issue for us to decide is whether chapter 940 of the Laws of 1984 substantially advances a legitimate State interest, justifying the State's imposition of distinctive encumbrances and obligations on plaintiffs' private property rights.

Id. at 480 (citations omitted). Indeed, the Court of Appeals found it ***irrelevant*** that the plaintiff was not deprived of economically viable use of its property, since the sole basis of the complaint was a violation of *Agins'* first prong:

> No amount of extensive and virtually exclusive exploration of economic recalibration of the test, as an expectation for the future, can change that central controlling feature under reasonably clear precedents and principles. To take State action as with the challenged statute, the State must show a legitimate, substantial State interest that is closely, causally related to the action undertaken. The Constitution forbids State action by fiat, no matter the economic equation.

Id. at 486. It is essential for this Court to address the fundamental conflict between the California courts, the Ninth Circuit, and the highest court of New York on the crucial issue of federal constitutional law implicated in this case. The confusion that reigns on this question throughout the Nation's judiciary was recently highlighted in a decision by the United States Court of Appeals for the Federal Circuit:

> A pivotal criterion governing whether a regulatory taking has occurred is the impact the regulatory imposition has had on the economic use, and hence value, of the property. If a regulation categorically prohibits all economically beneficial use of land there is, without more, a compensable taking. On the other hand, though it is not necessary to have a total wipeout before the Constitution compels compensation, if the regulatory action is not shown to have had a negative economic impact on the property, there is no regulatory taking.

Hendler v. United States, 1999 WL 294710 (Fed. Cir. 1999), at *12. This analysis plainly reads *Agins'* first prong out of the

takings question altogether, just as the California courts have done, but in conflict with the treatment of first prong cases by the Ninth Circuit and the State of New York.

The time has come for this Court to address this spreading conflict. Further delay will only bring further confusion into the regulatory takings doctrines of the various state and federal courts throughout the Nation.

CONCLUSION

For all the above reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be GRANTED.

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Respectfully submitted,

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